No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Appellee.

On Appeals from the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,

LOUISE FOSTER,
Special Assistants to the Attorney General.

LLOYD H. BURKE,
United States Attorney.

CHARLES ELMER COLLETT,

WILLIAM H. LALLY,
Assistant United States Attorneys.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Appellee.

On Appeals from the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The opinion of the District Court (R. 56-70) is reported at 110 F. Supp. 795.

JURISDICTION.

This appeal involves income and victory tax for 1943 in the amount of $19,611.21, with interest, as to each taxpayer. (R. 38, 44.) A portion of the total tax

paid by each taxpayer for 1943 was paid to Collector James G. Smyth and a portion was paid to Collector Harold A. Berliner, but the original complaints (R. 3-18) sought to recover only from the former and were based on claims for refund which were filed on December 28, 1948, and which asserted taxes and interest due in the approximate amount of $32,700. (R. 7-10, 15-18.) These claims were rejected by the Commissioner on November 7, 1949 (R. 80), and suits were filed against Collector Smyth on December 9, 1949. (R. 10, 18.) After trial, judgment was rendered on October 4, 1950, in favor of Collector Smyth. (R. 25-27.) But a motion for a new trial was duly granted (R. 27-29) and the District Court also granted the taxpayers' motion to file amended complaints and to join Collector Berliner as a party defendant. (R. 30-33.) The amended complaints alleged that taxes for each taxpayer had been overpaid in 1943 in the amount of $52,329.79 and that of this amount $19,-611.20 had been paid to Berliner. (R. 34-44.) The cases were submitted to the District Court without a jury and judgment was entered on November 4, 1952, against Collector Smyth in favor of each taxpayer in the approximate sum of $32,500 with interest. (R. 82-84.) The District Court had jurisdiction of these suits under 28 U.S.C., Section 1340. Notice of appeal was filed January 2, 1953. (R. 85.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether the District Court was in error in holding that the amended complaints assert a ground for recovering a refund from Collector Berliner, appellee here, which was not included in the claims for refund.

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of the statutes and Regulations involved are set forth in the Appendix, *infra.*

STATEMENT.

These suits seek to recover income taxes alleged to have been illegally assessed and collected from the taxpayers for the year 1943. The original complaints were filed only against Collector Smyth (who is not involved here) but, upon permission being given to the taxpayers, amended complaints were filed and Collector Berliner was then joined as a party defendant. Only the taxes paid to the latter are involved on this appeal.

The facts as found by the District Court are as follows (R. 72-81):

The taxpayers are residents of Stockton, California, and, being married all during the years 1938 through 1943, they reported their income on a community basis. They filed their income tax returns for 1943 with Collector Smyth and such returns, as well as their books, were kept on a cash basis. (R. 72-73.)

The taxpayer George French, Jr., made payments of income tax to Collector Berliner as follows (R. 73):

GEORGE FRENCH, JR.

Date of Payment	Amount
7-15-43	$29,451.94
9-15-43	26,219.78
12-15-43	13,701.94
1943 payment by employer of amount withheld from compensation	11,521.56
Total	$80,895.22
LESS: overpayment refunded	11,745.10
Total net payment equal to net liability per 1943 return	$69,150.12

Mrs. Mary E. French made payments of income tax to Collector Berliner on the same dates and in approximately the same amounts as those listed above for her husband. (See details, R. 73.)

No part of these payments has been refunded to the taxpayers. (R. 73.)

Taxpayer George French, Jr., received a total compensation of $429,196.69 for his personal services under his contract of employment with Oranges Brothers Construction Department. Of that sum, 4.85 per cent or $20,827.87 was received prior to January 1, 1943, and 95.15 per cent or $408,368.82 was received during 1943 on two different dates. (R. 75.)

Attached to each taxpayer's 1943 income tax return was a Schedule "M" showing various details including the allocation of the 1943 income over the period of services rendered by George French, Jr., from November 15, 1938, to May 31, 1943. On each Schedule "M" it was stated that the allocation was made in

accordance with the provisions of Section 107(a) of the Internal Revenue Code and is as follows (R. 75):[1]

1938	2	months	$ 15,063.87
1939	12	"	90,383.14
1940	12	"	90,383.14
1941	12	"	90,383.14
1942	12	"	90,383.11
1943	1	and 5 mos.	31,772.42
Total			$408,368.82

[1]Only the figures under the column marked "Total" are given above as such figures represent the allocation for both installments of compensation received by George French, Jr., in 1943.

Schedule "M" also indicated the amount of compensation actually received in the prior years including $15,727.87 for 1942. (For complete list see R. 76.) The income tax liability on the income allocated to the calendar year 1942 for the taxpayers was set out on Schedule "M" as follows (R. 76):

Year 1942		George French, Jr.		Mary E. French
Net income per amended return		$ 7,764.34		$ 7,764.33
Amount taxable per sec. 107(a)		45,191.55		45,191.56
Total for computation		$52,955.89		$52,955.89
Less:				
Personal exemption	$454.17		$745.83	
Credit for dependent	291.67	745.84		745.83
Surtax net income		$52,210.05		$52,210.06
Less: earned income credit		1,400.00		1,400.00
Balance subject to normal tax		$50,810.05		$50,810.06
Normal tax		$ 3,048.60		$ 3,048.60
Surtax		24,698.63		24,698.64
Total		$27,747.23		$27,747.24
Less income tax per item 17, p. 4		1,598.96		1,598.96
Balance tax at 1942 rate		$26,148.27		$26,148.28

The taxpayers did not claim forgiveness of 75 per cent of their income tax liability in accordance with Section 6 of the Current Tax Payment Act of 1943. (R. 77.)

After the taxpayers' returns for 1943 were audited, the agent who audited them made a report stating that George French, Jr., was a partner and not an employee of the Oranges Brothers Construction Department and so held that the taxpayers must compute their tax without reference to Section 107 (a) of the Internal Revenue Code. A protest was filed but a conference report also held that French was a partner and the Commissioner determined deficiencies against each taxpayer which were paid with interest to Collector Smyth. (R. 77-78.)

On December 28, 1948, the taxpayers filed timely claims for refund. (R. 78.) Each of these stated "specifically as a basis for the refund claimed" that the income tax returns for 1943, showing a total tax of $69,150.12, and the amended returns for 1942 "were in all respects true and correct returns" of the taxable income and taxes for those years (R. 79) and that the deficiencies for 1943 were based on the following errors (R. 79-80):

> (1) The disallowance of the application of the provisions of Section 107, Internal Revenue Code, in limitation of his income and victory tax liability on compensation for services received in 1943, for services during and for a period of more than 36 months, as computed in his said return for 1943:

> (2) The computation of his income from services during the years 1942 and 1943, on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and * * *

These claims for refund were disallowed by the Commissioner on November 7, 1949. (R. 80.)

The District Court concluded (R. 81-82) as to Collector Berliner, appellee here, that the amended complaint asserts a ground for recovery that is not included in the refund claims as follows (R. 82):

> A claim that plaintiffs are entitled to forgiveness of seventy-five per cent (75%) of the tax on income allocated to 1942, by virtue of Section 6 of the Current Tax Payment Act.

Therefore the District Court decided that the taxpayers cannot recover any sum against the appellee here and entered judgment in taxpayers' favor only for the amount of deficiencies and interest paid by them to Collector Smyth. (R. 82-84.)

SUMMARY OF ARGUMENT.

The District Court correctly held that the taxpayers are not entitled to recover any part of their 1943 taxes paid to Collector Berliner, appellee here. Taxpayers admit that no suit for recovery of taxes allegedly overpaid can be maintained until a refund claim has been duly filed and that such claim must set forth in detail each ground upon which a refund is claimed

and give facts sufficient to apprise the Commissioner of the exact basis thereof. Taxpayers also admit that their refund claims set forth only one ground for recovery and that the new allegations in their amended complaints include material not set forth in their claims. But they assert that such variance is not material. We cannot agree and the District Court did not agree either.

The taxpayers' sole purpose in filing their refund claims and in instituting their original suits against Collector Smyth was to recover deficiencies in taxes which they had paid for 1943. Such deficiencies were the result of a determination by the Commissioner that the taxpayer George French, Jr., was a member of a partnership and should be taxed on that basis. Thus the Commissioner held that the taxpayers were not permitted to allocate a portion of the compensation received in 1943 to prior years as provided in Section 107 of the Internal Revenue Code and as they had done in preparing their tax returns. The District Court however held that George French, Jr., was an employee, not a partner, and allowed taxpayers to recover the deficiencies and interest which had been paid to Collector Smyth. Such allowance also amounts to an approval of the taxpayers' 1943 tax returns as filed.

But it should be noted that nowhere in the claims for refund or in the original complaints against Collector Smyth are there any allegations by taxpayers that their method of applying Section 107 or in de-

termining the amount of their 1943 income or taxes was erroneous. Instead, they specifically stated in their claims that their returns were in all respects true and correct returns. Moreover, there was no reference in the claims to the Current Tax Payment Act of 1943 on which they now rely. Reference to that Act, as well as to the alleged errors in their returns, was first made in the amended complaints which also named Collector Berliner as a party. Thus it was not until these amended complaints were filed that the taxpayers sought to recover anything but the deficiencies they had paid to Smyth. In other words, it was not until the amended complaints were filed that the taxpayers sought to recover a portion of the 1943 taxes which they had reported on their tax returns and which they had paid to Berliner. The taxpayers are in error in contending that the new allegation which appears in the amended complaints do not present a new ground and that it merely refers to a mechanical step in the computation. Instead, the basis on which taxpayers necessarily rely for recovery here brings in a new issue, namely, the interpretation and application of two statutory provisions which were enacted for entirely different purposes. As the Commissioner was not apprised that the taxpayers were alleging any errors in the way Section 107 had been applied by them in preparing their 1943 returns and as the taxpayers did not rely on the Current Tax Payment Act of 1943 the taxpayers did not meet the requirements for their refund claims and should not recover.

As the many applicable cases show, the taxpayers who seek to recover from the Government are held to strict compliance with the law and long-approved Regulations.

ARGUMENT.

THE DISTRICT COURT CORRECTLY HELD THAT THE GROUND ON WHICH THE TAXPAYERS ARE SEEKING TAX REFUNDS HERE WAS NOT SET FORTH IN THEIR CLAIMS FOR REFUND AND THAT THEY ARE NOT ENTITLED TO RECOVER ANYTHING FROM THE APPELLEE.

The District Court held that no portion of the taxes paid by the taxpayers in 1943 to Collector Berliner, appellee here, could be recovered for the reason that the ground on which recovery was sought in the amended complaints was not set forth in the taxpayers' claims for refund. We submit that the District Court's decision correctly interprets the law and applies it to the facts of this case.

It has of course been repeatedly held that no suit for recovery of any taxes allegedly overpaid can be maintained until a claim for refund has been duly filed with the Commissioner "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof". Section 3772(a) of the Internal Revenue Code (Appendix, *infra*). The long-approved Regulations provide that a claim must set forth in detail each ground upon which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof.

Section 29.322-3 of Treasury Regulations 111 (Appendix, *infra*). Taxpayers admit that they must meet these requirements. Consequently there is no question here that the statutory provision and the Regulations just referred to are applicable but the taxpayers contend that they have complied with the requirements.

However, in making such a contention, taxpayers also admit that their claims for refund state only one ground for recovery and apparently agree that such ground is actually different from the ground set out in their amended complaints and on which they seek recovery here. But they argue that this variance is not material and assert (Br. 25) that the omission of the forgiveness feature from their refund claims is not that "of a datum upon which a computation is based but a failure to *apply* a computational step to the data at hand". We cannot agree and neither did the District Court. The taxpayers' contention is based on one ground whereas their amended complaints rely on another ground. Thus there is a fatal variance between the two and they have also failed to note or comply with the strict language of many applicable cases.

A. Basis for the refund claims.

At the outset, we wish to point out that the claims for refund (R. 7-11, 15-18) show in unmistakable language that such claims were filed solely to recover the sums paid by each taxpayer as tax deficiencies for 1943. That this is so is shown not only by the state-

ment that recovery should be allowed because the deficiencies were erroneously assessed but also by statements indicating specifically that the taxpayers were seeking to recover nothing but the deficiencies and interest thereon. Thus, by the limiting terms which the taxpayers used in their claims it is clear that they did not intend to cover that portion of their 1943 taxes which they reported on their returns but are now seeking to recover from the appellee. Consequently, such portion of the 1943 tax was not included in setting forth the ground for their refund claims and no recovery should be allowed in excess of the deficiencies and interest thereon.

We are of course aware, as taxpayers point out (Br. 32-33), that Courts have sometimes allowed a taxpayer to recover an amount larger than that asserted in a refund claim but our objection is different. We are not contending that any recovery by the taxpayers here should be limited to the deficiencies and interest merely because that was the amount indicated in their claims. What we are asserting is that by limiting their claims to the deficiencies, the taxpayers were necessarily required to limit, and actually did limit, their ground for recovery to the facts and the law which are applicable to, and are the underlying cause of, the deficiencies. But such ground is different from that on which they have sought recovery in their amended complaints and on which they are seeking it here. In other words, the reason why the taxpayers considered the deficiencies erroneous and sought their

recovery is not the reason why they subsequently sought recovery of that portion of the 1943 tax which they voluntarily reported and paid but now want returned to them.

It is of course apparent from the record that the deficiencies referred to in the refund claims were entirely due to the Commissioner's determination that one of the taxpayers, George French, Jr., was a partner in Oranges Brothers Construction Department. Such determination means, as taxpayers know, that the Commissioner did not accept the taxpayers' statement on their 1943 returns as to the amount of their income for that year and the reason he did not do so is because such returns did not treat French as a partner. Thus the Commissioner, in making his determination, first computed the portion of the company's earnings which was available to French when treated as a partner, and then the Commissioner computed the tax on such partnership earnings. This resulted in the deficiencies which the taxpayers paid to Collector Smyth and which are covered by the claims for refund.

That our interpretation of the refund claims is correct is shown by the following excerpts from the claim filed on behalf of George French, Jr., which is in all material respects like that filed by his wife (R. 9-10):

> The claimant claims *specifically as a basis for the refund claimed herewith that his Form 1040 income and victory tax return for the calendar year 1943,* showing a total income and victory tax liability of $69,150.12, and his amended Form 1040

income tax return for the calendar year 1942, *were in all respects true and correct returns of his taxable income and victory taxes for those years,* and that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, *based on the following errors:*

(1) The disallowance of the application of the provisions of section 107, Internal Revenue Code, in limitation of his income and victory tax liability on compensation for services received in 1943 for services during and for a period of more than 36 months, as computed in his said return for 1943;

(2) The computation of his income from services during the years 1942 and 1943 on the theory that, *and as if he had been a member of a partnership,* Oranges Brothers Construction Division; * * * (Italics supplied.)

We submit that the above excerpt clearly shows that the taxpayers' sole basis for their refund claims is that George French, Jr., was not a partner and that the Commissioner erred in holding that he was. Moreover, it is evident that the Commissioner did not have to consider Section 107 of the Internal Revenue Code (Appendix, *infra)* either in determining the deficiencies or in passing on the refund claims. Thus, as the taxpayers point out (Br. 23), the reference to Section 107 in their claims is not so much a separate allegation of error as it is a legal conclusion which the taxpayers hoped to have adopted if French was found

to be an employee instead of a partner. Consequently, what the taxpayers were actually requesting in their refund claims and also later on in their suit against Collector Smyth (R. 3-7, 11-15) was that they be allowed to recover what they had paid as deficiencies. The District Court has allowed this request (R. 81) and such allowance also amounts to approval of the taxpayers' 1943 returns as filed. In the latter connection, it should be noted that in computing their income for the purpose of those returns the taxpayers proceeded on the theory that George French, Jr., was an employee of the company, not a partner, and so they allocated a large portion of the sum received from the company in 1943 to other years as provided in Section 107.[2] But, as we shall point out more fully below, the allocation of their income was not made on the returns as they now contend that it should be and so they now want to repudiate part of their tax returns although they alleged in their refund claims (R. 9, 17) that such returns "were in all respects true and correct returns". Moreover it is important to note that taxpayers did not refer in any way in their refund claims to the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, on which they must rely for recovery here.

---

[2]The reason Section 107 would not apply here to the company (which is a partnership) is that it had actually earned income throughout the years the construction work was being done, and the Commissioner tried to treat the amount due to George French, Jr., as having been earned in the same years as the company earned it but, as French did not withdraw such sums until later years, mostly in 1943, the District Court held this was salary in the years received but taxable in accordance with Section 107.

B. Variance between the refund claims and the amended complaints.

In justification of their attempt to recover part of the original taxes paid to Collector Berliner, taxpayers imply that if their refund claims are sufficient to allow recovery from Collector Smyth, they are also sufficient to allow recovery from Collector Berliner. But the District Court correctly held otherwise for the reason that the taxpayers are attempting to recover from the latter on a ground not set forth in the refund claims. Actually, if the taxpayers had thought that their original complaints were sufficient as to both Collectors, they would have merely asked permission to join Berliner as a defendant and would not have changed or added to their original complaints. But they know they had to add an additional ground in order to recover from Berliner. As we have pointed out, it was their original intention to recover only the deficiencies (which were paid to Smyth). Then when the taxpayers decided that they also had a ground on which they could recover part of the original tax it was too late to amend their claims or file new ones. Thus they have attempted to accomplish the same result by filing amended complaints which not only named Berliner as a defendant, along with Collector Smyth, but also included a new allegation, applicable only to Berliner. (R. 36, 41-42.) This new allegation in the complaint filed by George French, Jr., asserts (R. 36):

> That in making such computation plaintiff inadvertently and mistakenly omitted to claim for-

> giveness of 75% of his 1942 income tax liability in accordance with Sec. 6 of the Current Tax Payment Act. That plaintiff's correct total income and victory tax liability for the taxable year of 1943 on all incomes received from his employment by Oranges Brothers Construction Department and from other sources amounted to $49,538.92. That plaintiff paid to Harold A. Berliner, who was then Collector of Internal Revenue for the First Collection District of California, with his principal office at San Francisco, California, the tax of $69,150.12 * * *

The above allegation and a similar one in the amended complaint filed by Mrs. French are the first indications that the taxpayers were relying on Section 6 of the Current Tax Payment Act of 1943 (Appendix, *infra)* or thought that they had any rights under such Act which had not been allowed. Thus as stated by the District Court after considering the alleged errors in the refund claims (R. 61)—

> There is in those assignments not the slightest intimation, either of fact or of law, that the taxpayer was relying upon the "forgiveness" provisions of Section 6 of the Current Tax Payment Act of 1943.

Accordingly, we submit that the taxpayers have shifted their ground and are relying here on a section of law which was not set out or referred to in their claims for refund although that is required by the Regulations. *Real Estate Title Co. v. United States,* 309 U. S. 13; *Lucky Tiger-Combination Gold Mining Co. v. Crooks,*

95 F. 2d 885, 889 (C.A. 8th); *Continental-Illinois Nat. Bank & Trust Co. v. United States,* 67 F. 2d 153 (C.A. 7th).

The taxpayers of course object to the District Court's holding that the new allegations in the amended complaints should be treated as a new and separate ground for recovery. In this connection, they assert (Br. 32) that the application of the foregiveness feature of the law is but one step, and a rather mechanical step, in the computation of a Section 107 taxpayer's tax liability. Of course one answer which can be made to that contention is that each item which enters into a tax computation might be called one mechanical step. For example, it might be said that whether a sum should be deducted could also be called one step in a computation. But certainly it will be admitted that a taxpayer who seeks recovery on account of a claimed deduction must set forth the kind of deduction sought and the exact facts relating to it.

However, we think the better answer to taxpayers' argument is that there is more involved here than one mechanical step in a computation. Thus the variance is not attributable to a mere mathematical error but results from the interrelated effect of Section 107 (a) and the so-called forgiveness features in Section 6 of the Current Tax Payment Act of 1943 upon income received in lump sums in 1943 for services rendered by George French, Jr., over a period of years including 1942 and 1943. Hence, by taxpayers' amended complaints they raise a new issue, namely, whether

the provisions of Section 107 combined with Section 6 of the Current Tax Payment Act have the effect of reducing the tax on long-term compensation received in 1943 to the extent of the tax which would have been forgiven had an allocable portion actually been received in 1942. This issue obviously was not raised in the claims for refund and its solution depends on discovering the legislative intent of the above statutory provisions which were enacted for entirely unrelated reasons.

As we have pointed out, when the claims for refund were filed by the taxpayers on December 9, 1948 (R. 10, 18), the taxpayers were then contesting only the Commissioner's determination that George French, Jr., was a member of the partnership and the denial by the Commissioner of the benefits of Section 107 (a). Thus the taxpayers' claims, which covered only the amount of the deficiency, did not, even in a general way, take into consideration the forgiveness feature of the Current Tax Payment Act of 1943 and nothing was said therein to notify the Commissioner that the taxpayers considered their tax returns to be in error in computing the effect of Section 107. Instead, the claims made the positive assertion that the returns for both 1942 and 1943 "were in all respects true and correct". (R. 9, 17.) Therefore the taxpayers originally sought to *reinstate, not to change,* the method of computation they had adopted in their tax returns. Now they would repudiate what they did originally and would have their tax computed by applying Section 6 of the Current Tax Payment Act of 1943.

In taking such a position, taxpayers rely (Br. 27-28) principally on *Knox v. Commissioner,* 10 T.C. 550. This case does not involve a refund claim nor does it discuss the law relative to such claims, but it does involve both Section 107 (a) of the Internal Revenue Code and Section 6 of the Current Tax Payment Act of 1943. As six judges of the Tax Court joined in a very strong dissenting opinion in that case, we think the majority view expressed in the *Knox* case may be open to question, particularly in view of the very logical interpretation expressed in the dissenting opinion as to the various provisions in both sections. But, even if the *Knox* decision is a correct interpretation of the law, that does not help the taxpayers here. The Tax Court's opinion in the *Knox* case was promulgated on March 30, 1953, or nine months before the claims for refund were filed here and we are permitted to assume that such decision was known to the taxpayers or their counsel. But that decision was not referred to nor was there anything included in the claims to indicate that taxpayers wished to change their returns and have their tax computed in accordance with the *Knox* case. Taxpayers have indicated (R. 32) that the reason why the forgiveness feature of Section 6 was not referred to was that the Commissioner had published a regulation contrary to the *Knox* case. That is of course an excuse which also cannot help the taxpayers now. The taxpayers knew, and have admitted here, that every ground on which they relied for recovery should be set out in their claims and that any suit for recovery must be within the

limits set out in the claims. Consequently, if they interpreted the law as given in the *Knox* case and were relying on such interpretation they should of course have said so in their refund claims but they failed to make such a statement.

It should also be noticed here that the taxpayers are actually taking inconsistent positions on this matter. They are contending in effect that their refund claims are broad enough to cover all the grounds, or errors, alleged in their amended complaints, but at the same time they assert that they did not need to mention either Section 6 of the Current Tax Payment Act of 1943 or the alleged errors in the way Section 107 had been applied on their tax returns. Obviously they cannot properly take both positions.

Moreover, in making the latter assertion, they cannot correctly state that the new issue raised by the amended complaints applies merely to mechanical steps in the computation. Actually the issue is one to determine the year in which to allocate income. Under the Commissioner's original interpretation of Section 107, income received in a lump sum for services rendered over prior years was in fact income of the year in which received, but the portion allocable to the earlier years was taxable as if received in those years. However, when the computation was finished, all of the tax on such income was to be included with the tax of the year in which the income was received. But under the majority view in the *Knox* case, the tax on income allocated to 1942 was not included in the 1943

tax. Instead, such tax was not only computed at 1942 rates but was counted finally as a part of 1942 tax. See dissenting opinion in the *Knox* case, pp. 557-559. Thus it is clear that the new issue presents a complicated question relating to the interpretation of two unrelated statutory provisions and was certainly a matter which should have been set out in the refund claims.

C. The applicable cases which support the District Court's decision.

The taxpayers cite many cases relative to refund claims but as some of these cases are the ones also cited by the District Court and as most of them merely set forth the general principles already referred to we will not discuss them individually. It is of course obvious from what taxpayers point out about these cases that some involve different facts and are not helpful. As to other cases to which we will now refer, we think it is evident that taxpayers have ignored or underestimated the effect to be given to the clear and unambiguous language therein.

In stating the general rule relating to refund claims, this Court pointed out in *Rogan v. Ferry,* 154 F. 2d 974, 976, that the claim must set forth *in detail each ground* on which a refund is claimed and facts sufficient to apprise the Commissioner of the *exact basis thereof.* That means that the claim must give the Commissioner specific notice of both *the nature and the amount of the claim. United States v. Felt & Tarrant Co.,* 283 U.S. 269, 272; *Snead v. Elmore,* 59

F. 2d 312 (C.A. 5th); *H. Lissner Co. v. United States,* 52 F. 2d 1058 (C. Cls.). The reason for such rule is of course to permit the Commissioner to correct alleged errors in the first instance and, if the disagreement persists, to limit the subsequent litigation to issues which have been previously examined by the Commissioner. *Carmack v. Scofield,* 201 F. 2d 360, 362 (C.A. 5th).

Therefore, in preparing the claim for refund, the taxpayer must give a definite statement of the basis for his claim. In this connection, this Court in *Vica Co. v. Commissioner,* 159 F. 2d 148, 150, approved the statement in *Maas & Waldstein Co. v. United States,* 283 U. S. 583, 589, that—

> *Meticulous compliance* by the taxpayer with the prescribed conditions must appear before he can recover. (Italics supplied.)

Thus, even though the facts given in a claim might cover another ground, the taxpayer can recover only on the statutory provision relied on in the claim and cannot shift his ground to another provision subsequently when suit is filed. *Nemours Corp. v. United States,* 188 F. 2d 745 (C.A. 3d), certiorari denied, 342 U. S. 834; *A. M. Campau Realty Co. v. United States,* 69 F. Supp. 133 (C. Cls.); *Ronald Press Co. v. Shea,* 114 F. 2d 453 (C.A. 2d); also see *Mesta v. United States,* 137 F. 2d 426 (C.A. 3d).

In the *Nemours* case, the claim for refund was based on Section 26 (f) of the Revenue Act of 1936, c. 690,

49 Stat. 1648, as added by Section 501 of the Revenue Act of 1942, c. 619, 56 Stat. 798, but when suit was filed the taxpayer also relied on Section 26 (c)(3) of the same Act. Both sections were special relief provisions added in 1942 but the Court, in denying taxpayer the right to rely on the latter, stated (p. 750):

> It is to be noted that both the grounds for recovery and the facts supporting them must be shown. The taxpayer stated as its ground for refund Section 26(f) and made its computation accordingly. *That does not, under the decisions, give him a right to claim under some other section.* * * *
>
> This is hard law, no doubt. Perhaps it is necessarily strict law in view of the scope of the operations of a fiscal system as large as that of the United States. Whether that is so we are not called upon to say. We apply the rule; we do not make it. *It is to be observed that recovery of claims against the Government has always been the subject of a strict compliance requirement. The recovery of claims for tax refunds is but an application of this broad and strict rule.*
>
> * * * * * * *
>
> The taxpayer cannot recover under Section 26 (f) because as shown above we do not think he has made out a claim. He cannot get a refund under Section 26 (c)(3) because he did not state that Section as a ground when he filed his refund claim. * * * (Italics supplied.)

Consequently we submit that the taxpayers cannot minimize or ignore the variance between the ground

for the refund claims and the ground for recovery here merely by stating (Br. 29-30) that the Commissioner requires no aid from the taxpayer to be informed as to the applicable provisions of law governing the situation here. It is not a question of what the Commissioner may know about the law. It is a question as to what statutory provisions the taxpayers think should be interpreted and applied to give them a correct computation. In granting the privilege of suing the United States, Congress has purposely prescribed narrow limits in which to exercise this privilege and the Commissioner is not required to guess what a taxpayer wishes to recover or to determine what a taxpayer might have done. He needs only to look at the claim as actually filed and can hold a taxpayer to the specific claim as filed. This is so even though the Commissioner may have information in his own files which would substantiate the ground subsequently advanced by the taxpayer (*Angelus Milling Co. v. Commissioner,* 325 U. S. 293) or may ascertain, in the course of a general audit of taxpayer's accounts, sufficient facts to sustain the subsequent ground for recovery (*Mesta v. United States, supra).* It has long been said that when one deals with the Government he must turn square corners and there is no instance in which this is more true than in a suit for refund of taxes allegedly overpaid. The taxpayers here have not met the strict requirements for the maintenance of such a suit and are not entitled to recover.

CONCLUSION.

The decision of the District Court as to the appellee here is correct and should be affirmed.

Respectfully submitted,

H. Brian Holland,
Assistant Attorney General,
Ellis N. Slack,
Louise Foster,
Special Assistants to the Attorney General.

Lloyd H. Burke,
United States Attorney,
Charles Elmer Collett,
William H. Lally,
Assistant United States Attorneys.

October, 1953.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code:

SEC. 107 [As added by Sec. 220 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Sec. 139 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 119 of the Revenue Act of 1943, c. 63, 58 Stat. 21]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.

(a) *Personal Services.*—If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual.

* * * * * * *

(26 U.S.C. 1946 ed., Sec. 107.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected

without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

* * * * * * *

(26 U.S.C. 1946 ed., Sec. 3772.)

Current Tax Payment Act of 1943, c. 120, 57 Stat. 126:

SEC. 6. RELIEF FROM DOUBLE PAYMENTS IN 1943.

(a) *Tax for 1942 Not Greater Than Tax for 1943.*—In case the tax imposed by Chapter 1 of the Internal Revenue Code upon any individual * * * for the taxable year 1942 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against the tax for months withheld at source) is not greater than the tax for the taxable year 1943 (similarly determined), the liability of such individual for the tax imposed

by such chapter for the taxable year 1942 shall be discharged as of September 1, 1943, except that interest and additions to such tax shall be collected at the same time and in the same manner as, and as a part of, the tax under such chapter for the taxable year 1943. In such case if the tax for the taxable year 1942 (determined without regard to this section and without regard to interest or additions to the tax) is more than $50, the tax under such chapter for the taxable year 1943 shall be increased by an amount equal to 25 per centum of the tax for the taxable year 1942 (so determined) or the excess of such tax (so determined) over $50, whichever is the lesser. This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud.

* * * * * * *

(d) [As amended by Sec. 506 of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Rules for Application of Subsections (A), (B) and (C).*—

* * * * * * *

(3) *Foreign tax credit and application of sections 105, 106, and 107.*—The credit against the tax imposed by Chapter 1 of the Internal Revenue Code for the taxable year 1943 allowed by section 31 of such chapter (relating to taxes of foreign countries and of possessions of the United States), shall be determined without regard to subsections (a) and (b). Sections 105, 106, and 107 of such chapter (relating to limitations on tax) shall be applied without regard to subsections (a) and (b).

* * * * * * *

(h) *Regulations.*—This section shall be applied in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. (26 U.S.C. 1946 ed., Sec. 1622, note.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.322-3 [As amended by T.D. 5325, 1944 Cum. Bull. 152]. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or Form 1040A, as provided in this section and should be filed with the collector of internal revenue. A separate claim shall be made for each taxable year or period.

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. * * *

* * * * * * *